Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
UCN, Inc.,	)	
	)	
	)	
Transferee,	)	WC Docket No. 05-198
	)	
Transtel Communications, Inc. Tel America of Salt Lake City, Inc. Extelcom, Inc.	)	
	)	
Transferors,	)	
	)	
Joint International and Domestic Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Transfer Certain Assets of Authorized International and Domestic Carriers	)	

COMMENTS OF APCC SERVICES, INC.

Albert H. Kramer
Robert F. Aldrich
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(202) 828-2236

Attorneys for APCC Services, Inc.

Dated: June 8, 2005

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of UCN, Inc., Transferee, Transtel Communications, Inc. Tel America of Salt Lake City, Inc. Extelcom, Inc. Transferors, Joint International and Domestic Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Transfer Certain Assets of Authorized International and Domestic Carriers	)	WC Docket No. 05-198

COMMENTS OF APCC SERVICES, INC.

APCC Services, Inc., ("APCC Services"), pursuant to Section 63.03 of the Federal Communications Commission ("FCC" or "Commission") rules, 47 CFR § 63.03, submits the following comments, on behalf of itself and the payphone service providers ("PSPs") it represents, regarding the application of UCN, Inc. ("UCN") and Transtel Communications, Inc. ("Transtel") for Commission authorization for the transfer of assets of Transtel subsidiaries Tel America of Salt Lake City, Inc. ("Tel America"), and Extelcom, Inc., d/b/a ExpressTel ("ExpressTel"), to UCN. APCC Services urges the Commission either to deny the application or to condition approval of the application on payment of the unpaid compensation that Tel America owes to the PSPs represented by APCC Services. At a minimum, the Commission should remove the application from streamlined processing pending a determination whether Tel America's non-payment of compensation violates the FCC payphone compensation rule.

I. STATEMENT OF INTEREST

APCC Services is an agent of payphone service providers ("PSPs") for the billing and collection of dial-around compensation.[1] On May 16, 2003, APCC Services billed Tel America – one of the transferor's subsidiaries whose assets would be transferred pursuant to the instant application – on behalf of more than 1,000 PSPs for more than $500,000 in dial-around compensation owed by Tel America to those PSPs for the period from November 1996 through March 1998. APCC Services billed Tel America for these amounts pursuant to the FCC's *Payphone Compensation True-Up Order* in the payphone compensation proceeding, CC Docket No. 96-128.[2]

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1 Dial-around compensation is prescribed by the FCC and is paid by carriers to PSPs as compensation for the use of payphones to place coinless calls using toll-free numbers. These calls are known as "dial-around calls" because, by dialing a toll-free number, the caller ensures that the call is routed to carrier who is not necessarily the carrier preselected by the PSP for carrying calls from the PSPs' payphones. Section 276 of the Act required the Commission to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." 47 U.S.C. § 276(b)(1)(A). With respect to dial-around calls, the FCC concluded that, because PSPs could not otherwise obtain fair compensation for such calls, the carriers to which dial-around calls are routed must (in the absence of individual agreements) pay the PSP compensation for each completed call at a prescribed "default" rate per call. Carriers' dial-around compensation obligations are codified in Sections 64.1300-1320 of the Commission's rules. 47 CFR §§ 64.1300-1320.

2 *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274 (2002) (*"Payphone Compensation True-Up Order"*).

Tel America has refused to pay the compensation, contending that the Commission's order is erroneous and illegal, despite the fact that the Order has been upheld by the Court of Appeals.[3] There is currently an informal complaint proceeding pending against Tel America for recovery of the unpaid compensation.[4] APCC Services and the PSPs it represents are interested in this proceeding to the extent that the proposed asset transfer may impair APCC Services' ability to collect the unpaid compensation owed to PSPs.

II. DISCUSSION

APCC Services urges the Commission either to deny the instant application or to condition its approval on payment of the unpaid compensation that Tel America owes to the PSPs represented by APCC Services. At a minimum, the Commission should remove the application from streamlined processing pending a determination whether Tel America's non-payment of compensation violates the Commission's payphone compensation rule. 47 CFR § 63.03(c)(1). Grant of the application would not serve the public interest if the transfer of assets becomes a mechanism for Tel America to evade its outstanding compensation obligations established by the Commission's *Payphone Compensation True-Up Order*.[5]

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3 *AT&T v. FCC*, 363 F.3d 504 (D.C. Cir. 2004).

4 See Exhibit 1 (copy of the informal complaint filed by APCC Services, Inc., *et al.* against Tel America, December 30, 2004, File No. EB-04-MDIC-0118).

5 APCC Services' review of the instant application was delayed because a copy of the application was unavailable from the ECFS system until Monday, June 6, 2005. APCC Services diligently pursued obtaining the application, but because the application only became available on Monday, APCC Services has not had time to complete its investigation. Therefore, APCC Services reserves the right to present additional facts and arguments regarding the proposed transfer of control.

In the *Payphone Compensation True-Up Order*, the Commission adopted an order addressing carriers' liability to pay dial-around compensation to PSPs for the use of payphones during past periods for which the original compensation scheme had been overturned by the U.S. court of appeals.[6] The rules adopted by the Commission in that order specified the amounts to be paid to PSPs per-phone, per-month by each of approximately 500 carriers, including Tel America. *See Payphone Compensation True-Up Order*, Apps. A, B, C. The per-phone amounts owed by each carrier were established based on the total number of dial-around calls completed monthly from an average payphone and the average share of dial-around traffic handled by each carrier, including Tel America.

The *Payphone Compensation True-Up Order* took effect on January 2, 2003. On May 16, 2003, in accordance with that order, APCC Services billed Tel America on behalf of its PSP customers for more than $500,000 in dial-around compensation. *See* Exhibit 1. Tel America refused to make payment of the amount owed. *Id.* On December 30, 2004, APCC Services and several other PSPs and PSP representatives filed an informal complaint against Tel America for non-payment of the compensation. *Id.* Tel America refused to satisfy this complaint, contending, *inter alia*, that the Commission's order designating Tel America as liable is both erroneous and illegal. *Id.* The informal complaint remains pending, and the Commission's deadline for converting it into a formal complaint has not yet come.

Due to the pendency of these proceedings, the instant application has significant potential to impair the public interest. First, by failing to pay the compensation it owes to more than 1,000 PSPs, Tel America is currently in violation of the Commission's rules

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6 For an explanation of dial-around compensation, *see* note 1 above.

and orders and Section 201 of the Communications Act. *See* 47 CFR § 64.1301; 47 U.S.C. § 201(b). It is not in the Commission's interest to approve a transfer of control when an applicant has failed to pay a debt in violation of the Commission's rules and orders and the Communications Act.

Second, there is a significant likelihood that the transferors would use the instant transaction to attempt to evade payment of Tel America's compensation obligations. According to the application, the entire "customer base" of Tel America and ExpressTel will be transferred, along with physical assets, to UCN. Thus, it appears that Transtel, Tel America, and ExpressTel intend to exit the common carrier industry. Once the transaction is concluded, these entities may argue that they are no longer common carriers and are therefore no longer subject to the Commission's jurisdiction and cannot be subject to actions to collect unpaid compensation pursuant to Sections 206-208 of the Communications Act.

This possibility is not at all remote. In fact, it is likely. In a similar situation, APCC Services, Inc., and other PSP representatives and PSPs have attempted to collect some $200,000 in compensation owed by One Call Communications pursuant to the *Payphone Compensation True-Up Order*. The complainants learned that One Call Internet, Inc., the former owner of One Call Communications, had transferred control of One Call Communications to a new entity, and were informed that One Call Internet, Inc. retained responsibility for the prior debts of One Call Communications. When APCC Services, Inc., sought to collect the unpaid compensation from One Call Internet, Inc., that entity refused to pay on the grounds, *inter alia*, that it is no longer a common carrier and is therefore not subject to Commission jurisdiction or liability under the Communications Act. *See* Letter to Sandra Gray-Fields, Market Disputes Resolution

Division, Enforcement Bureau, from Steven A. Augustino and Randall W. Sifers, Kelley Drye & Warren, File No. EB-04-MDIC-0115 (February 22, 2005). While we believe this claim is meritless, it complicates the litigation and hinders the PSPs collection of compensation lawfully due under FCC rules and orders.

Third, the transaction will impair APCC Services' ability to collect the unpaid compensation from Transtel and Tel America because these companies will have divested their telecommunications assets. Thus, even after they have been found liable, there may be no effective means of compelling payment from these companies. In numerous prior cases, APCC Services' efforts to collect compensation owed by similar entities have been frustrated when the defendants declared bankruptcy or simply disappeared. *See, e.g. APCC Services, Inc., et al. v. ATX Telecommunications Services et al.*, Order, File No. EB-03-MD-018, DA 04-753 (Enf. Bur., rel. March 22, 2004) (holding in abeyance PSPs' compensation collection action after defendant files declares bankruptcy); *APCC Services, Inc., et al. v. TS Interactive, Inc.* Memorandum Opinion and Order, 19 FCC Rcd 10456 (Enf. Bur. 2004) (entering default judgment for unpaid dial-around compensation against carrier who never entered an appearance although it was fully aware of the complaint).

It clearly would not be in the public interest for the Commission to allow its transfer-of-control processes to be used as a vehicle for carriers to evade their payment obligations under Commission rules and orders.[7] Therefore, the Commission should

[7] *Cf.* 47 CFR § 1.1910 ("red light" rule providing that applications will be dismissed if the applicant has an unpaid debt to the Commission). There is an exception to the "red light" rule if an applicant has filed a timely challenge to the existence or amount of a debt; however, it would not serve the public interest to apply a similar exception here. The order determining Tel America's liability has already been

deny the instant application or should condition approval on payment of the unpaid payphone compensation that Tel America owes to PSPs. At a minimum, the Commission must remove the application from streamlined processing in order to determine whether Tel America's non-payment of compensation violates the Commission's payphone compensation rule.[8]

Respectfully Submitted,

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Fax (202) 887-0689

Attorneys for APCC Services, Inc.

Dated: June 8, 2005

(footnote continued)
upheld by the court of appeals. *See* note 3 above. Moreover, as explained above, approval of the proposed asset transfer may make it impossible for PSPs to collect the unpaid compensation owed by Tel America.

[8] If the Commission does approve the transaction and does not condition approval on payment of the unpaid payphone compensation, the Commission must require, as a condition of approval of the transfer, that UCN, which will remain a common carrier and which does not have a history of evading its compensation obligations, should certify that it has assumed responsibility for any unpaid payphone compensation obligations of Transtel, Tel America, and ExpressTel. This alternative is inadequate because it would allow Transtel and Tel America to profit from this transaction even though they are in violation of the Commission's rules; however, this alternative at least would enable PSPs to recover the unpaid compensation, and thus would mitigate the effects of the transferors' rule violations.

EXHIBIT 1

STAMP AND RETURN

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January 5, 2005

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JAN - 5 2005

Federal Communications Commission
Office of Secretary

Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W., TW-A325
Washington, DC 20554

Re: Informal Complaint filed by APCC Services, Inc., et al. against Tel America of Salt Lake City, Inc.

Dear Ms. Dortch:

On December 30, 2004, we filed an informal complaint on behalf of APCC Services, Inc., Data Net Systems, LLC ("Data Net"), Davel Communications, Inc ., Jaroth, Inc. d/b/a Pacific Telemanagement Services, and Intera Communications Corp. against Tel America of Salt Lake City, Inc.

Due to a collating mistake, we inadvertently omitted the fifth (signature) page of the informal complaint and included the signature page of a different informal complaint filed the same day against a different party.

Corrected copies of the complaint with the correct signature page are submitted herewith and served on the parties listed below.

Respectfully submitted,

Robert F. Aldrich

Enclosure

cc: Radhika Karmarkar, Deputy Chief, Market Dispute Resolutions Division, Enforcement Bureau, FCC (by U.S. Mail)
Jonathan Reel, Market Dispute Resolutions Division, Enforcement Bureau, FCC (by U.S. Mail)
James Troup, McGuire Woods & Battle (by Certified Mail)
Stanley K. Stoll, Counsel for Tel-America, Inc., Blackburn & Stoll, LC (by Certified Mail)

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December 30, 2004

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., S.W., TW-A325
Washington, DC 20554

Dear Ms. Dortch:

APCC Services, Inc. ("APCC Services"), Data Net Systems, LLC ("Data Net"), Davel Communications, Inc., Jaroth, Inc. d/b/a Pacific Telemanagement Services, and Intera Communications Corp. hereby file this informal complaint against Tel America of Salt Lake City, Inc. ("Tel America" or "Defendant"), pursuant to Section 208 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 208, and Section 1.716 of the Commission's rules, 47 C.F.R. § 1.716.[1]

I. Complaintants' Contact Information

The names, addresses, and phone numbers for the various Complainants are as follows:

<u>APCC Services, Inc.</u>
10302 Eaton Place, Suite 340, Fairfax, VA 22030-2201
Phone: (703) 385-5300; Fax: (703) 385-5301

<u>Data Net Systems, LLC</u>
1608 Barclay Blvd., Buffalo Grove, IL 60089
Phone: (847) 808-8988; Fax: (847) 808-8913

1 On April 12, 2004, APCC Services and Data Net filed an informal complaint against Tel America on this matter. A copy of the prior informal complaint is attached as Exhibit A to this complaint. The Bureau attempted to mediate the complaint. Tel America refused to participate in the mediation. The instant informal complaint, filed on behalf of APCC Services and Data Net and three additional parties, is intended to replace that earlier filing.

Davel Communications, Inc.
10120 Windhorst Road
Tampa, FL 33619
Phone: (813) 623-3545; Fax: (813) 740-9406

Jaroth, Inc. d/b/a Pacific Telemanagement Services
14472 Wicks Blvd., San Leandro, CA 94577
Phone: (888) 420-6700; Fax: (510) 347-3636

Intera Communications Corp.
6920 Koll Center Parkway, Suite 211, Pleasanton, CA 94566
Phone: (925) 461-4200; Fax: (925) 461-1906

All contact with Complainants should be through the undersigned counsel.

II. Defendant's Contact Information

The name and address of the Defendant is as follows:

Tel America of Salt Lake City, Inc.
324 South State Street
Suite 102
Salt Lake City, UT 84111-2330

III. Statement of Facts

On October 27, 2002, the FCC issued its true-up order in CC Docket No. 96-128. *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274 (2002) ("*Order*"). The *Order* resolved long-standing questions regarding the amount of compensation due to payphone service providers ("PSPs") pursuant to Section 276 of the Communications Act, 47 U.S.C. § 276(b)(1)(A), for dial-around calls made during several periods: (1) the "Interim Period" (November 7, 1996 to October 6, 1997);[2] (2) the "Intermediate Period" (October 7, 1997 to April 20, 1999); and (3) the "Post-Intermediate Period" (April 21, 1999 to the present). In the *Order*, the FCC adopted rules setting the payment obligations of carriers for calls made from payphones during these periods. This dispute concerns compensation to APCC Services' customers for calls made during all three periods.

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[2] PSPs who are not local exchange carriers ("LECs"), including the PSPs represented by APCC Services, are entitled to interim compensation for the entire Interim Period. LEC PSPs are entitled to Interim Period compensation only for the period from April 15, 1997 to October 7, 1997.

In the *Order*, the FCC determined that each PSP was entitled to be compensated in the amount of $35.224 per payphone per month for dial-around calls originating from its payphones during the Interim Period. In Appendix A to the *Order*, the Commission allocated that amount among the carriers that it found had carried dial-around calls originating from payphones, based on the relative call volumes handled by each carrier from payphones during the period. One of the carriers identified in Appendix A is Tel America. The FCC assigned Tel America 0.3227813% of the total compensation amount, or $.11369647 per phone per month.

The Commission also determined that, for the Intermediate and Post-Intermediate periods, carriers that did not pay per-call compensation to a PSP are required to make flat-rate payments per payphone per month. A carrier's flat-rate payments for these periods were also determined as a percentage of an overall per-phone payment of $35.224 per payphone per month, based on the average share of total dial-around calls handled by the carrier during the period in question.

In Appendix B of the *Order*, the Commission stated the amount of each carrier's flat-rate-per-payphone-per-month obligation for the Intermediate Period. For the Intermediate Period, the FCC assigned Tel America 0.10673413% of the total compensation amount, or $.03759603 per phone per month. In Appendix C of the *Order*, the Commission stated the amount of each carrier's flat-rate-per-payphone-per-month obligation for the Post-Intermediate Period. For the Post-Intermediate Period, the FCC assigned Tel America 0.05266606% of the total compensation amount, or $.01870698 per phone per month.

After reconciling its data, on May 16, 2003, APCC Services, which is authorized to collect dial-around compensation on behalf of numerous PSPs, sent Tel America an invoice representing what APCC Services believed Tel America owed its customers for the three periods.[3]

On September 16, 2003, four months after receiving APCC Services' letter, Harold Paulos, Director of Operations for Tel America, wrote back to APCC Services, disputing the claims for payment. Tel America argued that it was not required to pay for several reasons. First, Tel America stated that APCC Services had not provided proof of eligibility, and claimed that "after October, 1997," the only payphones eligible for per-phone compensation were "those prevented by deficiencies in LEC software/hardware from passing coding digits identifying calls as originating from a payphone." Second, Tel America claimed that APCC Services' submission of claims was not timely, alleging that only claims submitted within one year of the end of the quarter were eligible for payments. Third, Tel America claimed that its allocated share of per phone compensation was erroneous, and Tel America claimed to be working with the FCC to reconcile data. Fourth, Tel America claimed that certain legal issues prevented recovery, contending (1) that there

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[3] The "ANIs" for payphones for which Davel Communications, Inc., and Intera Communications Corp. were entitled to compensation were included in APCC Services' invoice. These PSPs, however, are prosecuting this information complaint in their own names.

is no "private right of action" to recover damages for violating the compensation rules, (2) that Tel America received no notice from the FCC regarding the true-up, (3) that the FCC had engaged in retroactive rulemaking, and (4) that the FCC lacked the authority to require per-phone compensation because Section 276 specifies a "per-call" compensation scheme.

On October 15, 2003, Ruth Jaeger of APCC Services responded to Mr. Paulos. The letter responded to the issues raised by Tel America. On the issue of eligibility, the letter stated that (1) Tel-America's argument does not apply to amounts claimed for the Interim Period (the bulk of APCC's invoice) since the FCC had determined that all compensation for calls made prior to October of 1997 was to be paid on a per phone basis, whether or not coding digits used to help identify payphones were passed to carriers; and (2) under the Commission's true-up rules (47 CFR §§ 64.1301(d), (e), appended to the *Order* as Appendix F), the only criterion for eligibility for per-phone payments is that payphones otherwise eligible for payments did not receive any per-call compensation from the carrier

As to the timeliness issue, APCC Services stated that because the rules for Interim Compensation did not become effective until January 1, 2003, APCC Services' submission of its invoice on May 16, 2003 was clearly timely. As to Tel-America's disagreement with the per-phone surrogate rate determined by the Commission, APCC Services stated that if Tel America disagreed, it should have sought reconsideration or review of the *Order*. As to the legal issues raised by Tel America, APCC Services stated that Tel America should have sought reconsideration of the *Order*, but that in any event, (1) APCC Services had a clear right to seek damages for unreasonable carrier practices such as failure to pay compensation due, (2) Tel America received ample notice of its compensation obligation, and (3) the Commission had full authority to prescribe per-phone compensation retroactively where necessary to ensure fair compensation and correct legal errors.

On December 8, 2003, Stanley Stoll, outside counsel for Tel America responded. In that letter, Tel America repeated its claims. Once again it claimed that the FCC lacked statutory authority to implement a per phone compensation requirement, that the FCC rules constituted retroactive rulemaking, that Tel America had no notice of the proceeding, that there was no private right of action, and that APCC Services' submission of the invoice was not timely.

Complainant Data Net, which also collects dial-around compensation on behalf of various PSPs, sent Defendant Tel America a request for payment and explanatory letter on December 1, 2003. The request and letter was accompanied by CDs showing the ANIs for which Data Net was seeking to collect for each quarter of each of the three periods covered by the Commission's Order. Tel America did not respond. About three months later, Data Net sent Tel America a follow up letter.

Tel America also has failed to make payment to the other Complainants in accordance with the *Order*.

CORRECTED PAGE

By failing to make compensation true-up payments in accordance with the *Order*, Defendant has violated the payphone compensation provision of the Act, 47 U.S.C. § 276(b)(1)(A), has committed an unreasonable practice violating Section 201(b) of the Act, 47 U.S.C. § 201(b), and has violated Section 416 of the Act, 47 U.S.C. § 416(c)..

IV. Relief Requested

In this informal complaint, Complainants seek to require the Defendant to comply with the Commission's *Order* by paying the full amount of the true-up payment owed to the PSPs who are the customers of Complainants. In addition, Complainants hereby request that the Commission order Defendant to pay interest on unpaid compensation at the rate specified in the *Order*. Complainants further request that the Commission provide such other relief as it deems just and proper.

A copy of this letter is being sent by certified U.S. mail to Defendant addressed to Defendant's registered agent in the District of Columbia and to counsel for the Defendant.

Respectfully submitted,

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Robert F. Aldrich
Dickstein Shapiro Morin & Oshinsky LLP
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(202) 887-0689 (fax)

Attorneys for Complainants

cc: Radhika Karmarkar, Deputy Chief, Market Dispute Resolutions Division, Enforcement Bureau, FCC (by U.S. Mail)
Jonathan Reel, Market Dispute Resolutions Division, Enforcement Bureau, FCC (by U.S. Mail)
James Troup, McGuire Woods & Battle (by Certified Mail)
Stanley K. Stoll, Counsel for Tel-America, Inc., Blackburn & Stoll, LC (by Certified Mail)

EXHIBIT A

Stamp & Return

D I C K S T E I N S H A P I R O M O R I N & O S H I N S K Y L L P

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April 12, 2004

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APR 12 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., S.W., TW-A325
Washington, DC 20554

Dear Ms. Dortch:

APCC Services, Inc. ("APCC Services"), and Data Net Systems, LLC ("Data Net"), hereby file this informal complaint against Tel America of Salt Lake City, Inc. ("Defendant"), pursuant to Section 208 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 208, and Section 1.716 of the Commission's rules, 47 C.F.R. § 1.716.

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(847) 808-8988; Fax: (847) 808-8913

All contact with Complainants should be through the undersigned counsel.

II. Defendant's Contact Information

The name and address of the Defendant is as follows:

Tel America of Salt Lake City, Inc.
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Salt Lake City, UT 84111-2330

III. Statement of Facts

On October 27, 2002, the FCC issued its true-up order in CC Docket No. 96-128. *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274 (2002) ("*Order*"). The *Order* resolved long-standing questions regarding the amount of compensation due to payphone service providers ("PSPs") pursuant to Section 276 of the Communications Act, 47 U.S.C. § 276(b)(1)(A), for dial-around calls made during several periods: (1) the "Interim Period" (November 7, 1996 to October 6, 1997);[1] (2) the "Intermediate Period" (October 7, 1997 to April 20, 1999); and (3) the "Post-Intermediate Period" (April 21, 1999 to the present). In the *Order*, the FCC adopted rules setting the payment obligations of carriers for calls made from payphones during these periods. This dispute concerns compensation to APCC Services' customers for calls made during all three periods.

In the *Order*, the FCC determined that each PSP was entitled to be compensated in the amount of $35.224 per payphone per month for dial-around calls originating from its payphones during the Interim Period. In Appendix A to the *Order*, the Commission allocated that amount among the carriers that it found had carried dial-around calls originating from payphones, based on the relative call volumes handled by each carrier from payphones during the period. One of the carriers identified in Appendix A is Tel America. The FCC assigned Tel America 0.3227813% of the total compensation amount, or $.11369647 per phone per month. (A copy of the relevant portion of Appendix A is attached as Exhibit A.)

The Commission also determined that, for the Intermediate and Post-Intermediate periods, carriers that did not pay per-call compensation to a PSP are required to make flat-rate payments per payphone per month. A carrier's flat-rate payments for these periods were also determined as a percentage of an overall per-phone payment of $35.224 per payphone per month, based on the average share of total dial-around calls handled by the carrier during the period in question. In Appendix B of the *Order*, the Commission stated the amount of each carrier's flat-rate per payphone per month obligation for the Intermediate Period. For the Intermediate Period, the FCC assigned Tel America 0.10673413% of the total compensation amount, or $.03759603 per phone per month. (A copy of the relevant portion of Appendix B is attached as Exhibit B.)

In Appendix C of the *Order*, the Commission stated the amount of each carrier's flat-rate per payphone per month obligation for the Post-Intermediate Period. For the Post-Intermediate Period, the FCC assigned Tel America 0.05266606% of the total compensation amount, or $.01870698 per phone per month. (A copy of the relevant portion of Appendix C is attached as Exhibit C.)

---

[1] PSPs who are not local exchange carriers ("LECs"), including the PSPs represented by APCC Services, are entitled to interim compensation for the entire Interim Period. LEC PSPs are entitled to Interim Period compensation only for the period from April 15, 1997 to October 7, 1997.

After reconciling its data, on May 16, 2003, Ruth Jaeger of APCC Services, which is authorized to collect dial-around compensation on behalf of numerous PSPs, wrote to carriers identified by the FCC in the *Order*, including Tel America, with an invoice representing what APCC Services believed to be owed to its customers by each specific carrier for the three periods. (A copy of that letter with the invoice is attached as Exhibit D.)[2]

On September 16, 2003, four months after receiving APCC Services' letter, Harold Paulos, Director of Operations for Tel America, wrote back to APCC Services, disputing the claims for payment. (A copy of this letter is attached as Exhibit E.) Tel America argued that it was not required to pay for several reasons. First, Tel America stated that APCC Services had not provided proof of eligibility, and claimed that "after October, 1997," the only payphones eligible for per-phone compensation were "those prevented by deficiencies in LEC software/hardware from passing coding digits identifying calls as originating from a payphone." Second, Tel America claimed that APCC Services' submission of claims was not timely, alleging that only claims submitted within one year of the end of the quarter were eligible for payments. Third, Tel America claimed that its allocated share of per phone compensation was erroneous, and Tel America claimed to be working with the FCC to reconcile data. Fourth, Tel America claimed that certain legal issues prevented recovery, contending (1) that there is no "private right of action" to recover damages for violating the compensation rules, (2) that Tel America received no notice from the FCC regarding the true-up, (3) that the FCC had engaged in retroactive rulemaking, and (4) that the FCC lacked the authority to require per-phone compensation because Section 276 specifies a "per-call" compensation scheme.

On October 15, 2003, Ruth Jaeger of APCC Services responded to Mr. Paulos. (A copy of this letter is attached as Exhibit F.) The letter responded to the issues raised by Tel America. On the issue of eligibility, the letter stated that (1) Tel-America's argument does not apply to amounts claimed for the Interim Period (the bulk of APCC's invoice) since the FCC had determined that all compensation for calls made prior to October of 1997 was to be paid on a per phone basis, whether or not coding digits used to help identify payphones were passed to carriers; and (2) under the Commission's true-up rules (47 CFR §§ 64.1301(d), (e), appended to the *Order* as Appendix F), the only criterion for eligibility for per-phone payments is that payphones otherwise eligible for payments did not receive any per-call compensation from the carrier

As to the timeliness issue, APCC Services stated that because the rules for Interim Compensation did not become effective until January 1, 2003, APCC Services' submission of its invoice on May 16, 2003 was clearly timely. As to Tel-America's disagreement with the per-phone surrogate rate determined by the Commission, APCC Services stated that if Tel America disagreed, it should have sought reconsideration or review of the *Order*. As to

[2] Although the CDs accompanying Exhibit D contained the "ANIs" for payphones for which Davel Communications, Inc., and NSC Telemanagement Corporation were entitled to compensation, no separate invoice for those "ANIs" was included. A separate invoice for Davel and NSC has recently been sent to Tel America.

the legal issues raised by Tel America, APCC Services stated that Tel America should have sought reconsideration of the *Order*, but that in any event, (1) APCC Services had a clear right to seek damages for unreasonable carrier practices such as failure to pay compensation due, (2) Tel America received ample notice of its compensation obligation, and (3) the Commission had full authority to prescribe per-phone compensation retroactively where necessary to ensure fair compensation and correct legal errors.

On December 8, 2003, Stanley Stoll, outside counsel for Tel America responded. (A copy of this letter is attached as Exhibit G.) In that letter, Tel America repeated its claims. Once again it claimed that the FCC lacked statutory authority to implement a per phone compensation requirement, that the FCC rules constituted retroactive rulemaking, that Tel America had no notice of the proceeding, that there was no private right of action, and that APCC Services' submission of the invoice was not timely.

Complainant Data Net, which also collects dial-around compensation on behalf of various PSPs, sent Defendant Tel America a request for payment and explanatory letter on December 1, 2003. The request and letter was accompanied by CDs showing the ANIs for which Data Net was seeking to collect for each quarter of each of the three periods covered by the Commission's Order. (A copy of the request and letter is attached as Exhibit H.) Tel America did not respond. About three months later, Data sent Tel America a follow up letter. (A copy of that letter is attached as Exhibit I.) To date, Tel America has not responded.

IV. Relief Requested

In this informal complaint, Complainants seek to require the Defendant to comply with the Commission's *Order* by "trueing up" with the payphone service providers who are the customers of Complainants. In addition, Complainants hereby request that the Commission order Defendant to pay interest on unpaid compensation at the rate specified in the *Order*. Complainants further requests that the Commission provide such other relief as it deems just and proper.

A copy of this letter is being sent by certified U.S. mail to Defendant addressed to Harold Paulos, as the Defendant has no registered agent in the District of Columbia in the Commission's database, and to counsel for the Defendant who drafted the letter contained in Attachment G.

Respectfully submitted,

Albert Kramer

Albert H. Kramer
Dickstein Shapiro Morin & Oshinsky LLP
Washington, DC 20037
(202) 785-9700 (tel)
(202) 887-0689 (fax)
Attorneys for Complainants

cc: Radhika Karmarkar, Deputy Chief, Enforcement Bureau, Market Dispute Resolutions, Federal Communications Commission (By U.S. Mail)
Jonathan Reel, Market Dispute Resolutions, Federal Communications Commission (By U.S. Mail)
Harold Paulos, President, Tel-America, Inc., Director of Operations (By Certified Mail)
Stanley K. Stoll, Counsel for Tel-America, Inc., Blackburn & Stoll, LC (By Certified Mail)

ATTACHMENT A

APPENDIX A
Interim Period Allocation List

Name	Percentage	Amount
AT&T Communications	35.6752385%	$12.56624601
MCI	27.1012154%	$9.54613210
Sprint	11.8235636%	$4.16473205
WorldCom	11.7792597%	$4.14912643
LCI International	2.5385089%	$0.89416436
Frontier Communications Services	2.3634942%	$0.83251720
ILEC 2.19%	2.1900000%	$0.77140560
Cable & Wireless	0.9357654%	$0.32961401
Global Crossing Telecommunications	0.6794139%	$0.23931675
Switched Service Communications	0.5008847%	$0.17643164
U.S. Long Distance	0.4286315%	$0.15098115
Tel America	0.3227813%	$0.11369647
WorldCom Technologies	0.2815205%	$0.09916277
Qwest	0.2801439%	$0.09867788
Long Distance Savers	0.1505964%	$0.05304608
Frontier Communications-North Central Region	0.1446970%	$0.05096805
Pac-West Telecomm dba AmeriCall	0.1425208%	$0.05020151
Frontier Communications Int'l, Inc.	0.1390850%	$0.04899130
Telco Communications Group dba Dial & Save	0.1360130%	$0.04790920
Bell Atlantic Communications	0.1346397%	$0.04742549
Brooks Fiber Communications	0.1134805%	$0.03997236
Business Telecom, Inc. (BTI)	0.1101138%	$0.03878650
NETECH Comm. (US West)	0.0989391%	$0.03485029
One Call Communications	0.0986707%	$0.03475578
ATX Telecommunications Services	0.0941000%	$0.03314579
McLeodUSA	0.0938146%	$0.03304526
WorldXChange	0.0844956%	$0.02976272
American Network Exchange (AMNEX)	0.0666730%	$0.02348490
Broadwing Communications Services Inc.	0.0551409%	$0.01942282
American Telco	0.0534454%	$0.01882561
WesTel	0.0517618%	$0.01823259
West Coast Telecommunications	0.0513034%	$0.01807112
OCI	0.0503072%	$0.01772023
Access Long Distance	0.0448941%	$0.01581348
Total-Tel USA	0.0442117%	$0.01557311
GST Call America	0.0429595%	$0.01513205
NYNEX - Corridor	0.0404028%	$0.01423148
US Long Distance	0.0384286%	$0.01353608
Eastern Telecom International	0.0362242%	$0.01275963
Network Operator Services	0.0351831%	$0.01239290
GTE Communications Corp.	0.0344361%	$0.01212976
Shared Communications Services	0.0329638%	$0.01161116
Long Distance/USA (Sprint)	0.0321199%	$0.01131393
DeltaCom L.D.S.	0.0299628%	$0.01055411
Tandem Access for Database Query	0.0260948%	$0.00919165

ATTACHMENT B

APPENDIX B
Intermediate Period Allocation List

Names	Percentages	Amounts
AT&T Communications	35.24391644%	$12.41431713
MCI	23.61161155%	$8.31695405
WorldCom	12.96694860%	$4.56747797
Sprint	12.51899810%	$4.40969189
Frontier Communications Services	3.92149599%	$1.38130775
LCI International	2.37673530%	$0.83718124
ILEC 2.19%	2.19000001%	$0.77140560
Cable & Wireless	0.97917273%	$0.34490380
Switched Service Communications	0.49097550%	$0.17294121
Global Crossing Telecommunications	0.42983911%	$0.15140653
U.S. Long Distance	0.42561847%	$0.14991985
LCI	0.33335911%	$0.11742241
Telco Communications Group dba Dial & Save	0.31307165%	$0.11027636
PT-1 Communications	0.25384298%	$0.08941365
Business Telecom, Inc. (BTI)	0.23496687%	$0.08276473
Long Distance Savers	0.21586112%	$0.07603492
Qwest	0.20372964%	$0.07176173
IXC Communication Services	0.19060904%	$0.06714013
Teltrust	0.18761125%	$0.06608419
One Call Communications	0.14547001%	$0.05124036
EconoPhone	0.14188411%	$0.04997726
ATX Telecommunications Services	0.12896413%	$0.04542633
WorldXChange	0.10813630%	$0.03808993
Tel America	0.10673413%	$0.03759603
American Network Exchange (AMNEX)	0.10326189%	$0.03637297
Bell Atlantic Communications	0.09986097%	$0.03517503
American Telco	0.08260508%	$0.02909681
US Long Distance	0.08048481%	$0.02834997
Total-Tel USA	0.07600848%	$0.02677323
Cincinnati Bell Long Distance	0.06237390%	$0.02197058
WesTel	0.06191358%	$0.02180844
DeltaCom L.D.S.	0.06105990%	$0.02150774
Consolidated Network	0.05901859%	$0.02078871
OCI	0.05889480%	$0.02074511
Broadwing Communications Services Inc.	0.05419353%	$0.01908913
Network Operator Services	0.05175470%	$0.01823007
NETECH Comm. (US West)	0.05022277%	$0.01769047
Pac-West Telecomm dba AmeriCall	0.04830760%	$0.01701587
Tandem Access for Database Query	0.04718756%	$0.01662135
GTE Communications Corp.	0.04716124%	$0.01661208
Frontier Communications of the Great Lakes	0.04687323%	$0.01651063
NYNEX - Corridor	0.04680553%	$0.01648678
McLeodUSA	0.04342555%	$0.01529621
LONG DISTANCE OF MICHIGAN	0.04219019%	$0.01486107
The CommuniGroup Of KC	0.04049647%	$0.01426448
Telecom*USA (MCI)	0.03835522%	$0.01351024

ATTACHMENT C

APPENDIX C
Post-Intermediate Period Allocation List

Name	Percentage	Amount
AT&T Communications	33.69552735%	$11.96865132
MCI	17.02639727%	$6.04777631
Sprint	11.11485111%	$3.94799511
WorldCom	10.23852165%	$3.63672289
Global Crossing Telecommunications	7.15106942%	$2.54005986
Qwest	7.12891379%	$2.53219018
WCOM	3.45572976%	$1.22747521
ILEC 2.19%	2.19000000%	$0.77788800
Cable & Wireless	0.87472581%	$0.31070261
Global Crossing	0.73143840%	$0.25980692
Frontier Communications Services	0.67982311%	$0.24147317
Broadwing Communications Services Inc.	0.60573560%	$0.21515729
Telco Communications Group dba Dial & Save	0.57331218%	$0.20364049
Touch America, Inc.	0.52556846%	$0.18668192
IDT Corp.	0.46487055%	$0.16512202
Business Telecom, Inc. (BTI)	0.41529492%	$0.14751276
LCI International	0.38508503%	$0.13678220
WorldXChange	0.24004960%	$0.08526562
PT-1 Communications	0.19235182%	$0.06832337
McLeodUSA	0.18014775%	$0.06398848
One Call Communications	0.16435648%	$0.05837942
ATX Telecommunications Services	0.16231652%	$0.05765483
Excel Telecommunications	0.11654172%	$0.04139562
DeltaCom L.D.S.	0.11205694%	$0.03980263
Network Plus	0.09200160%	$0.03267897
Long Distance of Michigan (LDMI)	0.09124466%	$0.03241010
EconoPhone	0.08965730%	$0.03184627
Switched Service Communications	0.08282780%	$0.02942043
Intermedia Communications	0.08202164%	$0.02913409
VERIZON (not Verizon IntraLATA - LEC)	0.07539638%	$0.02678080
Total-Tel USA	0.06460627%	$0.02294815
Tel America	0.05266606%	$0.01870698
One Star Long Distance	0.05075153%	$0.01802694
The CommuniGroup Of KC	0.04547681%	$0.01615336
Tandem Access for Database Query	0.04360270%	$0.01548768
American Long Lines	0.04159377%	$0.01477411
Logix Communications	0.04139743%	$0.01470437
Bell Atlantic Communications	0.04136967%	$0.01469451
WesTel	0.03890862%	$0.01382034
NETECH Comm. (US West)	0.03875592%	$0.01376610
US WATS	0.02990079%	$0.01062076
Cooperative Communications	0.02482544%	$0.00881800
Pac-West Telecomm dba AmeriCall	0.02391389%	$0.00849421
Global Crossing Telemanagement	0.02192701%	$0.00778847
Capital Telecommunications	0.02078209%	$0.00738180
Broadwing Telecommunications Inc.	0.01993413%	$0.00708060
South Carolina Network	0.01829131%	$0.00649707

ATTACHMENT D

APCC SERVICES

MEMORANDUM

TO: Carriers Responsible for Interim, Intermediate & Post Intermediate Period True-Up

FROM: Ruth Jaeger
General Manager/Vice President

DATE: March 31, 2003

SUBJECT: FCC Order on Reconsideration and Order on Remand, October 17, 2002

The American Public Communications Council, through its wholly owned subsidiary APCC Services, Inc. (APCC Services), has been authorized to represent a large number of PSPs for the True-Up Periods. Those periods include the Interim Period (November 7, 1996 – October 6, 1997), the Intermediate Period (October 7, 1997 – April 21, 1999) and the Post Intermediate Period (April 22, 1999 – December 31, 2002).

APCC Services on behalf of the PSPs whose ANIs are represented in the billing CD, represents that the ANIs contained in this billing CD are previously paid ANIs and require a true-up of previously paid or unpaid dial around compensation. Disputed ANIs or ANIs not previously paid for other reasons are not included in this billing CD and no true-up is being requested for previously unpaid or disputed ANIs.

This memorandum, combined with the enclosed CD containing information on the PSPs represented by APCC Services and the PSP ANIs for which they are seeking compensation or true-up, serves as a billing invoice for your company's True-Up obligation to these payphone service providers for all the periods defined above – November 7, 1996 through December 31, 2002.

To assist you in processing your obligation, APCC Services has compiled an invoice and included that invoice in the folder titled, "_________" and has also attached a paper copy of the invoice to this notice. The invoice represents the amounts owed to the PSPs who have authorized APCCS to represent their interests for the true up process.

The ANIs on the billing CD and the related invoice are for the sole purpose of administering the FCC order True Up of previous periods. This CD should not be

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used to process the normal quarterly per call compensation for APCCS PSP customers.

APCC Services expects to receive payment on the enclosed invoice within 30 days from the date of this transmittal unless your company has raised a legitimate dispute to this invoice and/or to the information contained in the billing CD. To avoid further interest assessments or penalties, APCC Services should receive your compensation no later than May 1, 2003.

You may wire the total amount to APCC Services account at First Union Bank in Fairfax, Virginia. The account number is 2000004749475. The bank's wire ABA is 051400549.

If you have questions pertaining to your True-Up obligations, the True-Up Order or the required payment data formats that need to be sent to APCC Services, please contact Ruth Jaeger, APCC Services General Manager, at (703) 385-5300, ext. 240. Or, email Ruth at rjaeger@apcc.net.

We look forward to working cooperatively with you to facilitate compliance with your federally mandated per call payphone compensation payment obligations.

APCCS True-Up Invoice Page 1

APCC SERVICES, INC.
10302 EATON PLACE, SUITE 340
FAIRFAX, VA 22030
PHONE: 703-385-5300 FAX: 703-385-5301

Name : Tel America

IMPORTANT NOTE: PLEASE READ

The Grand Total listed at the end of this statement is due and payable.
To avoid additional interest charges, your payment must be received by April 30, 2003

Interim True-Up

Year/Qtr	#ANIs	FCC Ordered	Paid	Difference	Plus Interest
9604	254810	52,147.71	0.00	52,147.71	77,412.82
9701	264024	90,055.69	0.00	90,055.69	131,047.14
9702	276094	94,172.64	0.00	94,172.64	134,302.72
9703	287742	98,145.65	0.00	98,145.65	137,174.94
9704	291337	6,411.00	0.00	6,411.00	8,785.45

Total Invoiced plus interest = $488,723.07

Intermediate Surrogate True-Up

Year/Qtr	#ANIs	FCC Ordered	Paid	Difference	Plus Interest
9704	291337	30,739.28	0.00	30,739.28	42,124.18
9801	320102	36,103.59	0.00	36,103.59	48,619.42

Total Invoiced plus interest = $90,743.60

Intermediate Per-Call True Up

The number of ANIs is the number that received positive payments at the rate
of 28.4 cents. It is not the count of every ANI that received a per-call payment.

ATTACHMENT E

September 16, 2003

Ms. Ruth Jaeger
President
APCC Services
10302 Eaton Place, Suite 340
Fairfax, Virginia 22030

Re: Payphone Surcharge: May 16, 2003 Invoice

Dear Ms. Jaeger:

This letter responds to APCC Service's invoice. Please be advised that Tel America disputes your charges for per-phone compensation for the following reasons:

Factual Issues

TelAmerica

Eligibility for Per-Phone Compensation. APCC Services has provided no proof that the payphones for which per-phone ("surrogate") compensation is sought by APCC Services were in fact eligible for such compensation. After October, 1997, the only payphones potentially eligible for per-phone compensation were those prevented by deficiencies in LEC software/hardware from passing coding digits identifying calls as originating from a payphone. The FCC required PSPs to pass coding digits by October, 1997 as a condition for eligibility for any compensation.

Because most payphones were able to pass coding digits by 1997, please provide for each payphone claimed as eligible: (1) the date that the LEC switch became able to pass coding digits, (2) any waivers which explain why coding digits were not passed from that payphone, and (3) any steps you took to inform the FCC of APCC Service's non-compliance with the mandate to pass coding digits.

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Timely Submission of ANI. Only payphone ANI submitted by the PSP to the long distance carrier within one year after the end of the quarter for which compensation is claimed are eligible for compensation. The timeliness rules are a separate bar to your claims.[1]

Per-Phone Surrogate Used by APCC Services is NotApplicable to Tel America. The FCC's determination of the percentage of all payphone calls and the per-phone surrogate for Tel America in the Fifth Report and Order on Reconsideration and Order on Remand ("Fifth Report") is clearly erroneous. Tel America is a small, regional interexchange carriers having gross annual revenues of less than $100,000,000. Those carriers listed immediately below Tel America in Schedule A and Schedule B to the Fifth Report are national/international companies whose gross annual revenues are greatly in excess of those of Tel America. Based on Tel America's review of the RBOC surveys upon which the FCC relied in determining per-phone surrogates for all carriers in the Fifth Report, it appears that the percentage of payphone calls and the per-phone surrogate assigned to Tel America is grossly overstated. Tel America is currently working with the FCC in an effort to reconcile the percentage and per-phone surrogate assigned to Tel America with the actual number of payphone calls attributed to Tel America, which are reflected in the RBOC surveys.

Legal Issues

Parallel to our efforts to review the factual basis for APCC Service's claim, we have asked our attorneys to review the legal basis for the claim. That review is ongoing. At this point, the following matters concerning the FCC's rulemaking activities (which have so often been overturned by the courts) have been identified as potential barriers to your claim. We urge you to consider these potential legal barriers before deciding whether to press this claim further, given the effort that would be necessary to resolve the factual matters listed above.

Tel America

There is no "private right of action" to recover damages for violating regulations promulgated by the FCC pursuant to §276 of the Telecommunication Act of 1996. The United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") recently held in its Opinion in Zane Green, et al., v. Sprint Communications Company, et al., Case No. 02-56339, (Filed: August 25, 2003), that there is no private right of action for the relief that PSPs seek to recover damages for Sprint's alleged failure to pay compensation for

[1] LEC-affiliated PSPs cannot claim compensation for periods prior to the date on which the LEC certifies that it was removed payphones from its regulated rate base.

dial-around calls as required by FCC regulations promulgated pursuant to §276 of the Telecommunications Act. That being the case, the Ninth Circuit concluded that there is no federal claim for the PSPs to pursue and affirmed the District Court's dismissal of the PSPs' action to recover compensation under §276 and the FCC regulations promulgated thereunder.

Notice of Determination of Specific Company Liability. We were not notified by the FCC that is was collecting data to make the company-by-company determinations of liability published in the appendixes to the Fifth Order on Reconsideration. While rules can be adopted through publication in the Federal Register, notice and an opportunity to participate are essential before a court or agency can constitutionally evaluate facts to determine the individual liability of specific companies. This is why lawsuits and administrative complaints must be served upon the affected parties. Because the FCC did not take steps reasonably calculated to provide notice and we in fact did not receive notice, the liability determinations that you rely upon are not valid and therefore cannot support your invoices.

Retroactive Rulemaking. The FCC's First Report and Order established a per-phone compensation program expiring in October, 1997 and imposed payment obligations only on carriers with revenues exceeding $100 million. The D.C. Circuit Court of Appeals vacated that ruling and directed the FCC to adopt liability rules for per-phone compensation for the period ending in October 1997. In the Fifth Order on Reconsideration, the FCC finally did so, for the first time imposing liability on resellers with revenues under $100 million. Additionally, in the Fourth Order on Reconsideration, the FCC for the first time adopted a mandatory obligation to participate in per-phone compensation for periods after October 1997. The Fourth and Fifth Reconsideration Orders became effective on January 3, 2003. Our attorneys are investigating whether these Orders can lawfully apply to calls carried before January 3, 2003 under the strict anti-retroactivity principles applicable to rulemaking proceedings.[2]

Tel America

Statutory Mandate of "per-call" Compensation. Finally, the payphone compensation statue, 47 U.S.C. Sec. 276, authorizes the FCC only to adopt a "per-call" compensation system for each "completed intrastate and interstate call." There is no authorization to adopt a "per-phone" or surrogate compensation system that may or may not involve completed calls. Because the FCC can only adopt rules it is authorized by statute to

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[2]In the Fifth Order on Reconsideration, the FCC defended retroactivity by citing case law involving ajudicatory decisions, which are not subject to the stricter *Georgetown v. Bowen* standards applicable to rulemaking decisions.

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adopt, absence of rulemaking authority appears to be a separate bar to your claim under the Fifth Order on Reconsideration.[3]

Summary

For the reasons stated above and additional reasons that we may discover following further investigation, we must dispute your claims. Please do not hesitate to contact me should you have any questions.

Yours truly,

Harold M. Paulos

Harold M. Paulos
Director of Operations

TelAmerica

[3]Each of our objections to the FCC's rulemaking orders are substantive rather than procedural in nature and therefore can be raised in a defense to an enforcement proceeding, rather than solely through a direct appeal of the rulemaking order.

Year/Qtr	#Calls	#ANIs	FCC Ordered	Paid	Difference	Plus Interest

Total Invoiced plus interest = $0.00

Post-Intermediate Surrogate True-Up

APCCS True-Up Invoice Page 2

Year/Qtr	#ANIs	FCC Ordered	Paid	Difference	Plus Interest
0202	360493	20,231.13	0.00	20,231.13	20,485.59
0203	361502	20,287.76	0.00	20,287.76	20,287.76

Total Invoiced plus interest = $40,773.35

Grand Total Invoiced for the True-Up = $620,240.02

ATTACHMENT F

October 15, 2003

Harold M. Paulos
Director of Operations
Tel America
324 South State Street, Suite 102
Salt Lake City, UT 84111-2330

Re: May 16, 2003 Payphone Compensation Invoice

Dear Mr. Paulos:

I received your letter of September 16, 2003, responding to our May 16, 2003 invoice for payphone compensation. Our attorneys inform me that your asserted bases for disputing APCC Services' invoice are invalid, for the following reasons.

1. *APCC Services' Clients' Payphones Are Eligible for Per-Phone Compensation.* You complain that APCC Services has not established that its clients' payphones were eligible for per-phone compensation, and request proof in the form of evidence that the payphones were unable to transmit coding digits. The payphones listed in APCC Services' invoice were all found eligible for payment by interexchange carriers ("IXCs") that actually paid compensation during the periods involved. The additional criteria you cite do not apply.

For the Interim Period, the Commission has ruled that all payphones are entitled to per-phone compensation, because in that period the call tracking systems necessary for payment of per-call compensation had not even begun to be deployed by carriers. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274, ¶6 (2002)(*"Fifth Reconsideration Order"*).

For the periods from October 7, 1997, to April 20, 1999 ("Intermediate Period"), and from April 21, 1999 to the present ("Post-Intermediate Period"), the compensation rules provide simply that a carrier listed in the applicable appendix of the *Fifth Reconsideration Order* must pay the amount specified therein "for any payphone for any month during which per-call compensation for that payphone for that month was not paid by the listed entity." 47 CFR § 64.1301(d), (e), as amended (appended to the *Fifth Reconsideration Order* as Appx. F). Thus, the only additional criterion for eligibility for per-phone compensation is the fact that APCC Services and its clients never received any per-call compensation from Tel America for the payphones and quarters listed in the invoice.[1]

2. *APCC Services' Invoices Are Timely.* You also contend that APCC Services' invoices are untimely because they were not submitted to Tel America within one year of the end of the relevant quarter. APCC Services is billing Tel America under the rules adopted by the FCC in the *Fifth Reconsideration Order*, which took effect January 2, 2003. Tel America received APCC Services' claims in a timely fashion within five months of the January 2, 2003 effective date of the *Fifth Reconsideration Order*. Thus, whether APCC Services previously billed Tel America does not affect its liability. Even if prior billing was relevant, your argument would not be valid because (1) Tel America was not previously subject to the FCC's payphone compensation rules for the Interim Period, and (2) in other periods, APCC Services previously sent Tel America timely invoices and/or requests for payment.

3. *The Per-Phone Surrogate Is Applicable to Tel America.* You contend that the per-phone surrogate "used by APCC Services" is overstated. APCC Services' invoice simply applies the surrogate prescribed by the FCC in the *Fifth Reconsideration Order*. Your disagreement, therefore, is with the FCC, not APCC Services. If you disagree with the amount of Tel America's prescribed payment, then you should have requested reconsideration or review of the *Fifth Reconsideration Order*.

4. *There is a private right of action for collection of payphone compensation.* Your claim that there is no private right of action for collection of payphone compensation is incorrect. The Ninth Circuit ruling you cite addresses only the narrow technical question of whether a compensation collection action may be brought *directly* under Section 276 of the implementing rules. *Greene v. Sprint*, 2003 WL 21999367 (9th Cir., Aug. 25, 2003). Even on that narrow technical issue, recent decisions of the U.S. District Court for the District of Columbia contradict the Ninth Circuit holding. *See e.g., APCC Services, Inc. v. Cable & Wireless, Inc.*, C.A. No. 02-0158, Memorandum Opinion (D.D.C., September 4, 2003). In any event, failure to pay payphone compensation when due is not only a violation of Section 276 rules, but is also an unreasonable carrier practice

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[1] It is the IXC's responsibility, not the PSP's to order call tracking service, coordinate with local exchange carriers, and test the service to ensure that it is working. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 FCC Rcd 4998, ¶37 (Com. Car. Bur. 1998). It is the IXC's responsibility, therefore, to determine that it is not receiving call-tracking information, and to take appropriate action to ensure that the information is transmitted, and to make surrogate payments to payphones where it did not make per-call payments. A carrier who has failed to implement an accurate call tracking system (as is apparently the case with Tel America, as it did not, for example, pay any per-call compensation for any of APCC Services' payphones) prior to 1999, and has paid erratically, at best, since then, cannot transform its own negligence into an excuse to avoid per-phone payments.

violating Section 201(b) of the Act (a point that was not addressed in the *Greene* case). 47 U.S.C. § 201(b); *see Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, FCC 03-235, ¶32 (rel. October 3, 2003). It is beyond dispute of course, that parties injured by such an unreasonable practice may either bring a court action or file a complaint at the FCC to collect the resulting damages. 47 U.S.C. §§ 206-08.

5. *Tel America received ample notice of its compensation obligations.* Your objection that Tel America did not receive proper notice of the FCC's action is invalid and, in any event, is addressed to the wrong party. If you believe that the FCC has proceeded in a procedurally improper manner, you should have raised that question in a timely petition for reconsideration or review of the *Fifth Reconsideration Order*.

6. *The FCC Order Is Not Unlawful Retroactive Rulemaking.* You also object that the FCC's prescription of compensation obligations for past periods constitutes retroactive rulemaking. Again, this issue should have been raised in a petition for reconsideration or review. But in any case, the FCC's compensation rule prescribes a rate, and it is well established that while rate prescriptions are normally prospective only, where a prescription has been remanded by a court of appeals, the ratemaking agency is permitted to correct its own error retrospectively. *See, e.g., Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1073-75 (D.C. Cir. 1992); *Public Utils. Comm'n of California v. FERC*, 988 F.2d 154, 162-63 (D.C. Cir. 1993).

7. *The FCC Had Ample Authority to Prescribe per-Phone Rates.* Your claim that the FCC lacked authority to prescribe per-phone compensation is patently incorrect. The statute does not preclude the use of per-phone compensation; it simply requires the FCC to "*ensure* that payphone service providers are fairly compensated for each and every completed intrastate and interstate call." 47 U.S.C. § 276(b)(1)(A) (emphasis added). Where per-call payments are not feasible, the FCC would be violating this statutory command if it failed to ensure appropriate per-phone payments to PSPs.

Since none of Tel America's objections to satisfying its payphone compensation obligations has any merit, and since it has been five months since we issued our invoice to Tel America, I must request immediate payment of the amount due, or APCC Services will take action to compel payment.

Sincerely,

Ruth Jaeger
President, APCC Services

ATTACHMENT G

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Telephone (801) 521-7900
Fax (801) 521-7965

Stanley K. Stoll

December 8, 2003

Via Overnight Delivery

Ruth Jaeger
President
APCC Services
10302 Eaton Place, Suite 340
Fairfax, Virginia 22030

Re: May 16, 2003 Invoice

Dear Ms. Jaeger:

This firm represents Tel-America of Salt Lake City, Inc. ("Tel America"). This letter responds to your letter dated October 15, 2003. The September 16, 2003, letter from Harold Paulos, Director of Operations of Tel America, was Tel America's final denial of APCC Service's invoice claim. For the reasons stated below, Tel America continues to reject the charges contained in APCC Service's invoice of May 16, 2003.

No Statutory Basis

As previously stated, the payphone compensation statute, 47 U.S.C. § 276, only authorizes the FCC to adopt a "per-call" compensation system for each "completed intrastate and interstate call." The statute does not provide authorization for adopting a "per-phone" or surrogate compensation system that may or may not involve completed calls. The FCC may only adopt rules it is authorized by statute to adopt and the clear absence of rulemaking authority for a "per-phone" or surrogate compensation system bars APCC Services' "per phone" compensation claim. We note that this objection, as well as the other objections addressed herein, is substantive rather than procedural and may, therefore, be raised as a defense to any enforcement proceeding.

No Retroactive Rulemaking

Your analysis of the retroactive rulemaking issue is, at best, incomplete. Your reliance on a claim by the FCC that what it is doing is correct and is really not retroactive ratemaking is a hazardous prop on which to rest the weight of your analysis. Would the FCC have actually stated in its own order that it was promulgating an impermissible retroactive rule? Also, your reference to *Verizon v. FCC*, 269 F.3d 1098 (D.C. Cir. 2001), in no way lends support to your argument, but only helps to highlight a distinction between adjudicatory proceedings and rulemakings, which is key to the analysis.

The *Verizon* case, which the FCC also tenuously clings to, involved FCC decisions (the *EUCL Decisions*) stemming from adjudicatory proceedings which were then remanded by the court. In the adjudicatory proceedings the FCC was interpreting its own rules that it had adopted in an earlier rulemaking (the *Access Charge Reconsideration*). In its remand decision, the court accepted the change in the FCC's interpretation of its rules (the *Liability Order*) imposing retroactive liability on the local exchange carriers. In rendering its decision, the court very clearly distinguished between adjudicatory proceedings and rulemakings:

> The *Access Charge Reconsideration*, a rulemaking designed to establish how the LECs were to recover end-user costs in the future, was undoubtedly *legislative* in character. But this rulemaking was not 'revised' by the *Liability Order* that the LECs now challenge. Rather, the *Liability Order* merely corrected the *EUCL Decisions*, agency adjudications that had erroneously interpreted the original *Access Charge Reconsideration* by holding that particular instances of challenged conduct on the part of the LECs did not violate the regulations arising from that rulemaking. In those decisions the FCC did not purport to substitute a new legislative rule for an old one.

Verizon at 1108.

It is critical to respect the distinction between an adjudicatory proceeding and a rulemaking because, whereas retroactive liability may be permissible with respect to adjudicatory proceedings, retroactivity is almost always impermissible for rulemakings, for which there is a much stricter standard as articulated in *Bowen v. Georgetown*, 488 U.S. 204 (1998). In that ruling, the court stated that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Id.* at 208. The court went even further, finding that "[e]ven where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant." *Id.*

It is clear that the FCC established rules imposing liability on resellers with revenues under $100 million under its rulemaking authority. As such, the court in *Illinois v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), did not remand an FCC order based on adjudicatory proceedings, but rather based on a rulemaking. Nor did the court specifically mandate the FCC to revise its rules to retroactively impose liability on the resellers with revenues under $100 million. Rather, the court questioned the FCC's reasoning, found inadequate justification for the rules, and remanded to the FCC for "further consideration." *Id.* at 565. As part of its rulemaking proceeding, the FCC was required to provide better justification for its rules or revise the rules, but the court did not require the imposition of retroactive liability for certain carriers. Doing so would have violated the fundamental principle stated in *Bowen v. Georgetown*: "retroactivity is not favored by the law."

<u>No Notice</u>

As noted in Mr. Paulos' September 16, 2003, letter, Tel America was not notified by the FCC that it was collecting data to make the company-by-company determination of liability published in the appendixes to the *Fifth Order on Reconsideration*. Notice and an opportunity to participate in a regulatory proceeding are essential before an agency can constitutionally evaluate facts to determine the individual liability of specific companies. The failure of the FCC to provide such notice and opportunity to participate results in a violation of an affected party's Constitutional due process rights. Because the FCC did not take steps reasonably calculated to provide notice and Tel America did not receive notice, the liability determinations that you rely on are invalid and, therefore, can not support your invoices.

<u>No Private Right of Action</u>

We also point out that a recent decision by the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") held that there is no private right of action for PSPs that sought to recover damages for Sprint's alleged failure to pay compensation for dial-around calls as required by the FCC regulations promulgated pursuant to § 276 of the Telecommunications Act. *Zane Green v. Sprint Communications Co.*, Case No. 02-56339 (filed August 25, 2003). That being the case, the Ninth Circuit concluded that there is no federal claim for the PSPs to pursue and affirmed the District Court's dismissal of the PSPs action to recover compensation under either § 208 or § 276 and the FCC regulations promulgated thereunder.

Provision of Coding Digits

Per phone compensation is also not appropriate when a payphone is able to pass coding digits for purposes of tracking per call compensation. Tel America again requests that you provide for each payphone claimed eligible the following information: (1) the date that the LEC switch became able to pass coding digits; (2) any waivers which explain why coding digits were not passed from that payphone; and (3) any steps you took to inform the FCC of APCC Services' non-compliance with the mandate to pass coding digits.

The FCC required that the payphone service providers pass coding digits by October, 1997 as a condition for eligibility for any compensation. It is unlikely that suddenly all of APCC Services' payphones were able to pass coding digits on, but not before, October 1, 1997. Most payphones were already able to pass coding digits by 1997. As such it is most likely that most if not all of APCC Services' payphones were able to pass coding digits by April 1997. Tel America therefore reiterates its request for the specified information for each payphone covered by APCC Services' claim.

Timely ANI Submission

Contrary to APCC Services' assertion in ¶ 2 of its response, the FCC did not alter or amend its prior orders regarding stale claims in the *Fifth Order on Reconsideration*. In the instant case, APCC Services is requesting reimbursement for calls made over six years ago, but the FCC specifically directed that all invoices be submitted within one year after the end of the quarter for which compensation is claimed. "[C]arrier-payers should be able to refuse payment for compensation claims that are submitted long after they were due. Carriers should not refuse payment on timeliness grounds, however, for ANIs submitted by a PSP up to one year after the end of the period in question." *Order on Reconsideration*, 11 FCC Rcd 21233, 21282 (released Nov. 8, 1996).

APCC Services previously billed, and Tel America timely paid, per-call compensation for the Intermediate Period (October 7, 1997 — April 21, 1999) and the Post-Intermediate Period (April 22, 1999 — September 30, 2002) for all ANIs submitted by APCC Services.

The May 16, 2003 invoice relating to periods more than one-year after the end of the quarter for which compensation is claimed are, in accordance with the *Order on Reconsideration*, are time-barred. Not only is the APCC May 16, 2003 invoice for additional compensation for those periods time-barred, the fact remains that Tel America has previously paid its full compensation requirement for the Intermediate and Post-Intermediate Periods based on the ANI's submitted by APCC Services. There is no additional compensation for which Tel America is liable for those periods.

As to the Interim Period (November 7, 1996 — October 6, 1997), you have only now submitted an invoice for per-payphone surrogate compensation. Accordingly, your invoices for payphone compensation for the Interim Period exceed by five years the one year window provided by the FCC and, thus, all claims which APCC Services has for payphone compensation for the Interim Period, likewise, are time-barred.

Summary

For the reasons stated above Tel America continues to reject APCC Services's claims. Please do not hesitate to contact me should you have any questions.

Very truly yours,

BLACKBURN & STOLL, LC

Stanley K. Stoll
Counsel for Tel America

cc: Harold Paulos
Director of Operations
Tel America

ATTACHMENT H

December 1, 2003

Deleted: 1

Subject: Invoice for Payphone Dial-Around PSP Compensation

Dear Carrier,

Be advised that Data Net Systems is the designated billing and collection agent for the Payphone Service Provider (PSP) Companies listed on all files named DNS on the enclosed CD. Pursuant to the Federal Communications Commission's ("FCC") FIFTH ORDER ON RECONSIDERATION AND ORDER ON REMAND in CC Docket No. 96-128, and the regulations adopted by the Commission, your Company is required to compensate payphone service providers for originating access code and toll-free calls. This order requires payment for the Interim period, the Intermediate period, and the Post Intermediate period. Each LEC was assigned a default payment amount to be paid per payphone line in the incumbent LEC's local exchange area. The FCC mandated interest rate will be payable on all late payments.

The rules further allow that facilities-based carriers and resellers may establish or continue any other arrangements that they have with payphone service providers for the billing and collection of compensation for calls subject to Section 64.1300(a), if the involved payphone service providers so agree. Part 64, Section 64.1310(b). Please contact me at your earliest convenience to discuss whether an agreement can be reached for the continuing billing and collection of such compensation between your company and the PSPs that we represent.

This invoice for payment accompanies files listing the payphone lines for the Interim, Intermediate and Post Intermediate periods as identify by the FCC. These are ASCII text files, which contain the Billing Addresses and Payphone Numbers of the Payphone Companies claiming Dial-Around compensation. These Files contain three types of records: the first record begins with "A" and contains the Aggregator Name and Address, "Data Net Systems"; Company Records begin with the letter "O"; Payphone Records begin with the 10-digit telephone number and end with an "N" designating these are not inmate payphones.

Please forward the compensation for these lines and all associated detail.

<u>Send remittance and detail electronically to:</u>

Acct. Name: IPP ESCROW TRUST ACCOUNT
Bank Name: Cole Taylor Bank
Acct. Number: 069079811
ABA Routing: 071000343

Mail or e-mail call detail and payment notice to: **psottile@dnsys.com.**

Or, send remittance via check and Call Detail on disk to:

MAKE CHECK PAYABLE TO: "IPP ESCROW TRUST ACCOUNT".

Address:
IPP ESCROW TRUST ACCOUNT
C/O Data Net Systems, L.L.C.
1608 Barclay Blvd.
Buffalo Grove, Illinois, 60089-4523.

If you have any questions, please contact Pam Sottile at (847) 808-0288 x104.
E-Mail: psottile@dnsys.com **or Ed Kilb x112.**

Sincerely,

Edward F. Kilb
Vice President Operations & Secretary

ATTACHMENT I

March 18, 2004

Subject: Invoice for Payphone Dial-Around PSP Compensation

Dear Carrier,

In early December 2003 Data Net Systems sent your company an invoice and letter advising you that Data Net Systems is the designated billing and collection agent for all enclosed files for Payphone Service Provider (PSP) named DNS.

Accompanying the letter and invoice was also a CD listing files for the payphone lines for Interim, Intermediate and Post Intermediate periods as identified by the FCC. Pursuant to the Federal Communications Commission's ("FCC") FIFTH ORDER ON RECONSIDERATION AND ORDER ON REMAND in CC Docket No. 96-128, and the regulations adopted by the Commission, your Company is required to compensate payphone service providers for originating access code and toll-free calls

This is the 2nd request we are sending you concerning the Data Net Systems invoice for Payphone Dial Around PSP compensation. As of this time we have not received compensation nor heard from you regarding the matter.

If you have misplaced the CD we sent in December of 2003, please contact Pam Sottile immediately at (psottile@dnsys.com) or 847-808-0288 x104.

Otherwise please forward the compensation for these lines and all associated detail directly.

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2005, I caused a copy of the foregoing Comments to be served by electronic mail on the following:

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